Jabatan Peguam Negara v Eon Finance Bhd & Ors

HIGH COURT (KUCHING) — CASE NO KCH-42–18 OF 2011
RAVINTHRAN JC
6 JANUARY 2012

Criminal Procedure — Forfeiture — Dangerous drugs — Forfeiture of assets under s 25(2) of the Dangerous Drugs (Forfeiture of Property) Act 1988 — Presumption of illegal property — Whether evidence linked use of income from drug related activities in respect of purchase of assets — Whether claimant had proven her source of income to purchase assets — Presumption of illegal property rebutted — Dangerous Drugs (Forfeiture of Property) Act 1988 ss 25(2) & 35

The second claimant had married one Zainal @ Sapiee bin Arpan Molana ('Zainal') in 1995. The couple divorced in 2006. In 2002, Zainal was charged with trafficking drugs under s 39B of the Dangerous Drugs Act 1952 but was later acquitted of the said charge. However, in 2010 Zainal was arrested again under the Dangerous Drugs Act (Special Preventive Measures) 1985 ('DDASPM85'). Following his arrest, the police seized, inter alia, several properties including an apartment unit and a Maybank account. However, since the police did not bring any criminal charges or proceedings for forfeiture under the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act') against Zainal, the learned DPP referred the claim of the three claimants over the said properties to the sessions court under s 32. The learned sessions court judge ('judge') ruled that there was no presumption that the properties in question were illegal properties. In any event, the judge also found that the second claimant had rebutted any such presumption. The judge ordered the properties in question to be released to the respective claimants. The public prosecutor appealed against the decision of the judge pursuant to the inquiry under s 32 of the Act. The issue for consideration was whether there was sufficient evidence for the judge to support his conclusion that the said presumption had been rebutted.

Held, dismissing the appeal:

(1) The second claimant was not 'a liable person' ie was not a person against whom the police had brought forfeiture proceedings. Neither was she an 'associate' or 'relative' of Zainal against whom a restriction order under DDASPM85 was made (see para 8).

(2) The second claimant was a businesswoman and was the beneficiary of several government projects. She had been divorced from Zainal for more than three years when she purchased the apartment. The sale price of the

apartment was RM430,000. She had to pay a deposit of RM43,000 and had obtained a bank loan to finance the purchase. She explained that she had withdrawn RM22,952 from her EPF account and the rest was through her savings. She had worked for a long time, first as an airline stewardess and later as employee of a travel agency and as a businesswoman (see para 9).

(3) The second claimant admitted that Zainal had visited her apartment from time to time for the purpose of visiting the children of the marriage. This explanation was completely plausible as Zainal had right of access to his children despite the divorce (see para 9).

(4) There was no evidence linking the use of income from drug related activities in respect of the deposit used to pay for the apartment or the balance that was found in the Maybank account. The judge did not commit any error of law in assessing the evidence of the second claimant and the prosecution witness. Hence, there was no reason to interfere with the judge's finding of fact that the presumption under s 35 had been rebutted (see para 9).

[Bahasa Malaysia summary

Pihak menuntut kedua telah berkahwin dengan Zainal @ Sapiee bin Arpan Molana ('Zainal') pada tahun 1995. Pasangan tersebut bercerai tahun 2006. Pada tahun 2002, Zainal didakwa mengedar dadah di bawah s 39B Akta Dadah Berbahaya 1952 tetapi kemudiannya dibebaskan daripada pertuduhan tersebut. Walau bagaimanapun, pada tahun 2010 Zainal ditahan semula di bawah Akta Dadah Berbahaya (Langkah-langkah Pencegahan Khas) 1985 ('ADBLPK85'). Berikutan penangkapan tersebut, polis merampas, antara lain, harta-harta termasuk seunit apartmen dan akaun Maybank. Walau bagaimanapun, oleh kerana pihak polis tidak membawa apa-apa caj jenayah atau prosiding bagi pelucuthakkan di bawah Akta Dadah Berbahaya (Perlucutan Harta) 1988 ('Akta') terhadap Zainal, pihak pendakwaan merujuk tuntutan daripada ketiga-tiga pihak yang menuntut ke atas harta-harta tersebut kepada mahkamah sesyen di bawah s 32. Yang arif hakim mahkamah sesyen ('hakim') memutuskan bahawa tidak ada anggapan bahawa harta tersebut adalah harta haram. Dalam apa jua keadaan, hakim tersebut juga memutuskan bahawa pihak menuntut kedua telah menyangkal sebarang anggapan sedemikian. Hakim tersebut telah memerintahkan supaya harta-harta tersebut dilepaskan kepada pihak-pihak menuntut. Pendakwa raya merayu terhadap keputusan hakim menurut siasatan di bawah s 32 Akta. Isu untuk dipertimbangkan adalah sama ada terdapat keterangan yang mencukupi bagi seorang hakim untuk menyokong kesimpulannya bahawa anggapan tersebut telah disangkal.

Diputuskan, menolak rayuan:

(1) Pihak menuntut kedua bukan *liable person*; bukan seorang yang

terhadapnya polis telah membawa prosiding pelucuthakkan. Dia juga bukan seorang *associate* atau *relative* kepada Zainal yang mana suatu perintah sekatan di bawah ADBLPK85 telah dibuat terhadapnya (lihat perenggan 8).

(2) Pihak menuntut kedua adalah pengusaha dan merupakan benefisiari beberapa projek kerajaan. Dia telah bercerai dengan Zainal lebih daripada tiga tahun ketika dia membeli pangsapuri tersebut. Harga jualan pangsapuri tersebut adalah RM430,000. Dia terpaksa membayar deposit sebanyak RM43,000 dan telah mendapatkan pinjaman bank untuk membiayai pembelian tersebut. Dia menjelaskan bahawa dia telah mengeluarkan RM22,952 daripada akaun KWSP dan selebihnya adalah daripada simpanannya. Dia bekerja untuk masa yang panjang, bermula sebagai pramugari sebuah syarikat penerbangan dan kemudian sebagai pekerja agensi pelancongan dan sebagai pengusaha (lihat perenggan 9).

(3) Pihak menuntut kedua mengakui bahawa Zainal telah melawat pangsapurinya dari masa ke semasa bertujuan melawat anak-anak mereka daripada perkahwinan tersebut. Penjelasan ini adalah munasabah kerana Zainal mempunyai hak akses kepada anak-anaknya walaupun perceraian tersebut (lihat perenggan 9).

(4) Tiada bukti yang mengaitkan penggunaan pendapatan daripada aktiviti berkaitan dengan dadah berkenaan dengan deposit yang digunakan bagi pembayaran pangsapuri atau kira-kira yang telah didapati dalam akaun Maybank. Hakim tidak melakukan apa-apa kesilapan undang-undang dalam menilai keterangan pihak menuntut kedua dan saksi pendakwaan. Oleh itu, tiada sebab bagi campur tangan ke atas dapatan fakta hakim bahawa anggapan di bawah s 35 telah disangkal (lihat perenggan 9).]

Notes

For cases on dangerous drugs forfeiture, see 5(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 2058–2082.

Cases referred to

Hong Leong BAnk Bhd v PP [2009] 3 MLJ 546; [2009] 8 CLJ 463, HC (refd)
Loi Sui Chi & Satu Lagi lwn PP (2010) 1 LNS 1529, HC (refd)
PP v Tan Lee Kok [1998] 2 MLJ 65, CA (refd)
PP v Tiong Sii Chong Sibu High Court (42–4 of 2010), CA (refd)

Legislation referred to

Dangerous Drugs (Forfeiture of Property) Act 1988 ss 32, 35, Parts III, IV
Dangerous Drugs Act 1952 s 39B

Musli bin Ab Hamid (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Farina Suria bt Sulaiman (in person) for the respondent.

Ravinthran JC:

[1] This is an appeal by the public prosecutor against the decision of the sessions court judge pursuant to an inquiry under s 32 of the Dangerous Drugs (Forfeiture of Property) Act 1988 ('the Act'). The learned sessions court judge had ordered the properties in question to be released to the respective claimants.

BRIEF FACTS

[2] The properties that were seized by the police are:

(a) a Proton Perdana car bearing registration No QKW 57;

(b) RM25,911.89 in a Maybank saving account; and

(c) an apartment at Parcel No 4–6-C, Storey No 6 of Block No 4, Kasuma Resorts, Kuching.

[3] The claimants of the Proton Perdana car were the hirer, one Siti Fatimah Uni ('the third claimant') and financier, EON Finance Bhd ('the first claimant'). The vehicle was returned to EON Finance Bhd pursuant to the decision of the sessions court judge. The learned DPP has indicated mat he is not pursuing with the appeal in respect of the vehicle. The notice of appeal was not even served on them. In the premises, I shall dismiss the appeal against the decision of the sessions court judge to return the vehicle to the claimants.

[4] The only remaining respondent is the second claimant, Farina Suria bt Sulaiman. She is the daughter of the third claimant. She worked as a stewardess with Malaysian Airline Systems from 1992–1997. She married one Zainal @ Sapiee bin Arpan Molana ('the said Zainal') in 1995. The couple divorced in 2006. They have three school going children. Zainal was charged with trafficking drugs under s 39B of the Dangerous Drugs Act 1952 in 2002. He was acquitted of the said charge. However, on 12 February 2010, Zainal was arrested again under the Dangerous Drugs Act (Special Preventive Measures) 1985. Following his arrest, the police seized the properties in question and placed a restriction order upon him. As the police did not bring any criminal charges or proceedings for forfeiture under Dangerous Drugs (Forfeiture of Property) Act 1988 against the said Zainal, the learned DPP referred the claim of the three claimants to the sessions court under s 32.

JUDGMENT OF THE SESSIONS COURT

[5] The learned sessions court judge firstly held the burden to prove lawful

entitlement to the properties in question was on the second claimant. In support he cited the Court of Appeal case of *Public Prosecutor v Tan Lee Kok* [1998] 2 MLJ 65. However, he ruled that there was no presumption that the properties in question are illegal property. He came to this conclusion after adopting the reasoning of Lim Yee Lan J in *Hong Leong Bank Bhd v Public Prosecutor* [2009] 3 MLJ 546; [2009] 8 CLJ 463 who ruled that s 35 of the Dangerous Drugs (Forfeiture of Property) Act 1988 does not apply to a proceeding under s 32. The decision of Lim Yee Lan J in the above cited case may be summarised as follows. Her Ladyship said that s 32 only operates when the police do not bring proceedings against any person. In such a circumstance, any person claiming lawful entitlement to the property in question may stake a claim. For ease of reference I reproduce s 32 which reads as follows:

32 Forfeiture of property seized under this Act where there is no prosecution, or no proceedings under Part III or no claim thereto

(1) Where any property has been seized under this Act, other than under or by virtue of Part VII, and —

(a) no prosecution for any offence under any law is instituted with regard to such property;

(b) no proceedings are commenced by the Public Prosecutor for the forfeiture of such property under Part III; and

(c) no claim in writing is made by any person that he is lawfully entitled to such property and that it is not liable to forfeiture under this Act or under the Dangerous Drugs Act 1952, within three months from the date of its seizure, the property shall become forfeited immediately upon the expiration of the said period of three months.

(2) Where within three months from the date of the seizure of any property under this Act, a claim in writing is made thereto by any person in the terms mentioned in paragraph (c) of subsection (1), the Public Prosecutor shall within fourteen days after the expiry of the said period of three months, refer such claim to a Sessions Court for its decision.

(3) The Sessions Court to which a claim is referred under subsection (2) shall issue a summons requiring the person claiming that he is lawfully entitled to the property, and the person from whom it was seized, if he and his whereabouts are known, to appear before the Court and upon such appearance or in default of such appearance, upon due service of such summons being proved, the Sessions Court shall proceed to the examination of the matter and if satisfied that no offence under this Act or under the Dangerous Drugs Act 1952 has been committed in respect of the property claimed and that such property is not illegal property, shall order the same to be released to the person claiming the same upon proof that he is lawfully entitled thereto, and shall, in any other case, order the property to be forfeited.

(4) The provisions of this section shall be without prejudice to the power of a police officer to release from seizure any property under section 31.

(5) Where property has been forfeited under subsection (1), it shall not be a bar to any prosecution for an offence under any law being instituted in respect of such property at any time thereafter.

[6] Section 32 is found in Part IV of Dangerous Drugs (Forfeiture of Property) Act 1988. Section 35 which is found in Part VI reads as follows:

35 Presumption as to liable person and illegal property

Where any proceedings under this Act are brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property, the Court shall presume that person to be a liable person and that property to be illegal property, unless the person proceeded against proves to the contrary by admissible evidence and where he adduces any such evidence, the Public Prosecutor shall have the right to rebut the same.

[7] Lim Yee Lan J reasoned that for the presumption in s 35 to bite, there must firstly be in existence 'a proceeding' that is 'brought against any person or in respect of any property on the ground that such person is a liable person or that such property is illegal property'. Under the scheme of Dangerous Drugs (Forfeiture of Property) Act 1988, the police could have brought forfeiture proceedings under Part III against any person and such a person is known as 'a liable person'. She noted that s 32 only operates when no proceedings are brought against any person or property. Therefore, she concluded that s 35 cannot apply to s 32 proceedings. The reasoning of Lim Yee Lan J in *Hong Leong Bank Bhd v Public Prosecutor* was recently followed in the unreported Sibu High Court (42–4 of 2010) case of *Public Prosecutor v Tiong Sii Chong*. However, other courts had ruled that s 35 applies to s 32 as well. These cases are listed in *Loi Sui Chi & Satu Lagi lwn Public Prosecutor* [2010] 1 LNS 1529. However, I find it unnecessary to wade into the debate whether s 35 presumption applies to a s 32 proceedings for the following reason. The learned sessions court judge also ruled that the presumption had been rebutted by the second claimant. I shall therefore confine myself to addressing the issue whether the sessions court judge erred in law in coming to this finding. It is trite law that an appellate court should be slow to disturb the finding of facts of a trial. Even if the sessions court judge had misdirected himself by ruling that the s 35 presumption does not apply to a proceeding under s 32, the question to ask is whether there was sufficient evidence for the sessions court judge to support his conclusion that the said presumption had been rebutted.

EVIDENCE OF THE SECOND CLAIMANT

[8] In the instant case, the second claimant is not 'a liable person'. A 'liable person' is a person against whom the police have brought forfeiture

proceedings. Neither is she an 'associate' or 'relative' of Zainal against whom a restriction order under Dangerous Drags Act (Special Preventive Measures) 1985 was made. She testified unchallenged that she was divorced from Zainal since 2006. The divorce certificate from the Shariah Court was tendered in evidence. The apartment property was purchased by her only in July of 2009. The sale and purchase agreement states that the purchase price was RM430,000. The second claimant financed the purchase through a loan from RHB Bank. The deposit that she had paid at the outset was RM43,000. Part of the deposit was derived from the sum of RM22,952 that she withdrew from her Employee Provident Fund account. She tendered evidence to support her assertion. In respect of the sum of RM25,811.89 in her Maybank account, she said as follows. Her ex-husband, Zainal underwent emergency heart surgery at the Norman Hospital in February of 2010. As Zainal's family members were in West Malaysia, the second claimant had initially paid for the operation. She had issued a cheque to Normah Hospital to pay for the operation. Subsequently, Zainal reimbursed her when he came out of hospital. The documents pertaining to the purchase of the house, the divorce certificate and receipts from Normah Hospital were tendered in evidence. Although the learned sessions court judge ruled that the presumption in s 35 did not apply to the properties in questions, he accepted the evidence of the second claimant and her witnesses and found that the presumption had been rebutted in any event.

[9] Learned DPP submitted that the learned sessions court judge merely rehearsed the testimony of the second claimant and ruled that the second claimant had rebutted the presumption that the cash balance in the bank and the apartment are illegal properties. I find that there is no merit in this submission for the following reasons. The second claimant is a businesswoman whose companies, especially Surtrad Sdn Bhd, were registered with State and Federal Government bodies. She also testified before the sessions court that she was the beneficiary of several government projects. She had been divorced from Zainal for more than three years when she purchased the apartment property. Although the sale price of the apartment was RM430,000, she was only required to pay a deposit of RM43,000 as she had obtained a bank loan to finance the purchase. She explained that she had withdrawn RM22,952 from her EPF account and the rest was through her savings. The learned sessions court judge had considered her evidence that she had worked for a long time, first as an airline stewardess from 1992–1997 and later as employee of a travel agency and as a businesswoman. Since the evidence that she withdrew RM22,952 from her EPF account was uncontroverted, the only question is whether she could have come up with the balance of about of RM20,000 from legal earnings and not prohibited activities within the meaning of Dangerous Drugs (Forfeiture of Property) Act 1988. The learned DPP had even queried how the second claimant could afford to pay for a BMW car purchased by her. To my mind, this is an irrelevant question. The BMW car is not the subject of

the inquiry here. The only question that the sessions court judge should address and which he correctly did was whether the presumption that the deposit of RM43,000 and the cash balance of RM25,000 is illegal property had been rebutted. In respect of the deposit, the learned sessions court judge found that after taking into account the withdrawal of EPF payment, she could afford the balance of about RM20,000 from her savings and earnings from Sutrade Sdn Bhd of which she was director and shareholder. The second claimant had also given evidence that under the terms of the divorce, she received monthly maintenance of RM5,000 from her ex-husband. The prosecution had focused on the losses suffered in 2007 and 2008 by Surtrad Sdn Bhd and subjected the second claimant to a lengthy cross-examination. However, the deposit was paid in July of 2009. There was no evidence that the second claimant was so impecunious that she could not have raised the sum of RM20,000 from her savings, her earnings from Surtrad Sdn Bhd and her monthly maintenance of RM5,000. By that time she had been divorced from Zainal and the submission of the learned DPP that she was an associate of a 'liable person' was without merit. The second claimant was also questioned why Zainal had visited her apartment on several occasions. She admitted that Zainal had visited her apartment from time to time. However, she explained that it was for the purpose of visiting the children of the marriage. This explanation is completely plausible as Zainal has a right of access to his children despite the divorce. The learned sessions court judge, as a trier of fact, accepted the evidence of the second claimant that the sum of about RM20,000 used to pay for the deposit was not sourced from drug related activities. The sum of RM20,000 is not a huge sum of money given the fact that the second claimant had been working for a long time and had been involved in small government projects. Similarly, the second claimant explained that she paid the medical fees of Zainal amounting to RM35,000 by cheques from the account of Sutrade Sdn Bhd. Although the learned DPP submitted that Surtrad Sdn Bhd had suffered losses in 2007 and 2008, the payment of the medical fees was made in 2010. There was no evidence elicited from the second claimant that Surtrad Sdn Bhd did not have the money in 2010. The learned DPP also questioned the second claimant why there were frequent deposits and withdrawal in the account of Surtrad Sdn Bhd. The prosecution had elected not to proceed under Part III in of the Dangerous Drugs (Forfeiture of Property) Act 1988 against Surtrad Sdn Bhd Therefore, the suggestion that drug related money was being pumped into Surtrad Sdn Bhd was pure speculation. The learned sessions court judge accepted the evidence of the second claimant that she paid for the heart operation of Zainal and that he reimbursed her in the sum of RM25,000. The receipt that was issued by Normah Hospital was tendered in evidence by the second claimant. The learned sessions court judge found that there was no evidence linking the use of income from drug related activities in respect of the deposit used to pay for the apartment or the balance that was found in the Maybank account of the second claimant. As the learned sessions court judge did not commit any error of law in assessing the evidence of the second

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claimant and the prosecution witness, I see no reason to interfere with the sessions court judge's finding of fact that the presumption under s 35 had been rebutted.

[10] The appeal against the decision of the sessions court is hereby dismissed.

Appeal dismissed.

Reported by Kanesh Sundrum